No. 22121

IN THE

United States Court of Appeals For the Ninth Circuit

FOWLER MANUFACTURING COMPANY, a corporation,
Appellant,

v.

H. H. GORLICK and MORRIS GORELICK, co-partners, d/b/a THRIFTY SUPPLY COMPANY; THRIFTS SUPPLY CO. OF EVERETT, INC.; THRIFTY SUPPLY CO. OF SPOKANE, INC.; THRIFTY SUPPLY CO. OF TACOMA, INC.; and THRIFTY SUPPLY CO. OF YAKIMA, INC.,
Appellees and Cross-Appellants,

v.

HOWARD KELLER, KELLER SUPPLY COMPANY, INC., a corporation; MAX ROSEN; and NORMAN MESHER,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

JURISDICTION

The complaint was filed and proceedings instituted in the United States District Court for the Western District of Washington, Northern Division, against the appellant, Fowler Manufacturing Company, a corporation; cross-appellees, Howard Keller, Keller Supply Company, Inc., a corporation, Max Rosen and Norman Mesher (R. 1),

under the Federal Anti-trust laws, specifically: the Sherman Anti-trust Act, Sections 1, 2, 4 (15 U.S.C.A., Sections 1, 2, 4) and the Clayton Act, Sections 4, 15 and 16 (15 U.S.C.A., Sections 15, 25 and 26), and the Clayton Act, as amended, Sections 2 and 2(a), (15 U.S.C.A., 13 and 13(a)), which vests in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws (R. 1).

A motion by the appellant and cross-appellees for summary judgment (R. 72) as to all of the claims of the appellees, was granted except on claims of alleged violations as to 15 U.S.C.A., Sections 13 and 13(a) (R. 74, 336, Finding I).

Judgment was entered against the appellant, Fowler Manufacturing Company, in the amount of $25,621.80 plus $9,000 attorney fees and costs, or a total of $34,621.80 (R. 362). The cross-appellees, Howard Keller, Keller Supply Company, Inc., a corporation, Max Rosen and Norman Mesher, in said judgment were dismissed, with prejudice (R. 362).

On July 27, 1967 appellant filed Notice of Appeal in the District Court (R. 364). The appellees, on August 8, 1967, filed notice of cross-appeal (R. 375).

The appeal to the United States Circuit Court of Appeals for the Ninth Circuit is from a final decision of the United States District Court, for the Western District of Washington, Northern Division, which district court is in the Ninth Circuit.

The United States Circuit Court of Appeals for the

Ninth Circuit has jurisdiction by virtue of Section 1291 of the Judicial Code, Title 28, U.S.C.A., Section 1291.

STATEMENT OF THE CASE

The appellant, Fowler Manufacturing Company, has its principal place of business in Portland, Oregon (R. 339). During the period involved in this case; that is, October 28, 1960 through October 31, 1962, the Fowler Manufacturing Company manufactured and distributed electric water heaters and also distributed, but did not manufacture, gas water heaters (R. 339). The general labels were "Fowler" and "Republic" (Tr. 217). It also accommodated its customers by manufacturing under private labels (Tr. 1083). All the water heaters of any particular size manufactured by the appellant were precisely the same, irrespective of label, excepting for color trim (Tr. 1313). The cost of manufacture, as the Court found, was the same (R. 340, Finding VII).

Fowler Manufacturing Company manufactured a number of different sizes and models (Tr. 1329, 1330). The electric water heater far outsold the gas water heater; the ratio being about ninety percent electric and ten percent gas water heaters in the State of Washington (Tr. 1329), wherein the appellees and cross-appellees conducted their respective businesses.

The popular size in water heaters is fifty-two gallons, which takes in about fifty percent of the market (Tr. 1329). The next in popularity is the sixty-six gallon size, which accounts for approximately seventeen percent of the market (Tr. 1329), and the balance of the consumption of water heaters is covered by the other miscellaneous sizes and models (Tr. 1329, 1330). It was customary for

water heaters to carry warranties, and the prices of the water heaters varied according to the length and type of warranty, i.e., full or proportional (R. 340).

H. H. Gorlick and Morris Gorelick are brothers, although they spell their surnames differently (Tr. 2). During the period involved, they did business in Seattle as a co-partnership, under the firm name and style of Thrifty Supply Company (R. 262). They also owned substantially all the stock, in equal shares, in Thrifty Supply Co. of Everett, Inc., Thrifty Supply Company of Spokane, Inc., Thrifty Supply Company of Tacoma, Inc., and Thrifty Supply Company of Yakima, Inc. (R. 337, 338). The principal place of business of the co-partnership was and is in Seattle, with its distribution in Western Washington, primarily in the Puget Sound area (R. 337). Distribution of Thrifty Supply Company of Everett and Thrifty Supply Company of Tacoma, is in Western Washington primarily in the Puget Sound area (R. 337, 338).

The Thrifty Supply Company of Yakima, Inc. and Thrifty Supply Company of Spokane, Inc. have their respective sales areas in Eastern Washington (R. 338). All of the appellee corporations are Washington corporations (R. 337, 338).

For the purposes of this lawsuit, all of the appellee corporations were to be considered as one organization (R. 338).

The books and records of all the appellee corporations were kept at the Seattle office, where the accounting was done (R. 338). The purchases were all made from the Seattle office, but each corporation was invoiced separately (R. 338). Each corporation had its own bank account (R.

338). All bank accounts of the partnership and the four corporations were in the same bank, Peoples National Bank, First Avenue Branch, on December 4, 1962 (Ex. A-8).

The appellees were engaged as wholesalers in the distribution and sale of plumbing supplies (Tr. 2, 4), generally to plumbers working on new residential and apartment construction and to retail outlets (Tr. 3). One of the major items sold by appellees was hot water heaters, both gas and electric (R. 337).

All of the cross-appellees are engaged in the same type of business as the appellees (R. 338, 339). The cross-appellees are in direct competition with each other, and with appellees (R. 259, 339, Finding V).

Keller Supply Company, Inc. is a Washington corporation, with its principal place of business in Seattle, Washington (R. 338). Its sales area is mainly in Western Washington, in the Puget Sound area (R. 338).

Norman Mesher, doing business as Mesher Supply Company, has his principal place of business in Seattle, with his sales area mainly in Western Washington in the Puget Sound area (R. 338).

Max Rosen, doing business as Rosen Supply Company, has his principal place of business in Tacoma, Washington. His sales area is primarily in Western Washington, in the Puget Sound area (R. 339).

Howard Keller, Norman Mesher and Max Rosen are brothers-in-law (R. 263).

Norman Mesher has been in this business in Seattle since 1925 (Tr. 730); Howard Keller has been in the same

business since 1945 (Tr. 448). Appellees started in 1951 (Tr. 4).

The electric water heater is simple of design and quite uniform in manufacture (R. 340, Finding VII). There was very little to choose from among the water heaters manufactured by the various manufacturers servicing the territory wherein the appellees and cross-appellees were seeking business (R. 340, Finding VII). Competition for the sale of water heaters was very aggressive (R. 339).

During the period involved herein the main competition for the business of the wholesalers was from the following labels, each manufactured by a different manufacturer: Mission, Abco, White, General, National, Northern, Rheem, General Electric, Hotpoint, Westinghouse (R. 341, Finding VIII).

Wholesalers who competed on the same level with the appellees and cross-appellees were: Bowles Northwest, Doyle Supply, Palmer Supply, Far West Supply, Grinnel Company, Colombo Supply, Seattle Plumbing Supply, Pacific Plumbing Supply, Crane Company, Seattle Hardware, Pioneer Supply (R. 341, Finding IX).

Of the foregoing, Bowles Northwest, Palmer Supply, Grinnel Company, Seattle Plumbing Supply, and Crane Company were termed the "Big Five" in the industry (R. 341, Finding IX).

On or about October, 1958 Republic Transcon Industries took over the Fowler Manufacturing Company (Tr. 907, 908). The former had granted an exclusive on its Republic brand to the appellees (Ex. 26). Fowler Manufacturing Company, for all practical purposes, was selling only to Schwabacher Hardware, in addition to the appellees,

in the Puget Sound area in 1959 (Tr. 19). In the spring of 1960 the appellant desired more distribution in the State of Washington, and particularly in the Puget Sound area (Tr. 218, 219). Elmer Otis (Al) Wilson, sales representative of the appellant corporation, contacted H. H. Gorlick in the early summer of 1960 and informed him of this plan (Tr. 912, 913). H. H. Gorlick objected (Tr. 913) but the objection was not heeded as appellant felt current distribution and volume were not sufficient in view of the total market (Tr. 914).

Mr. Wilson contacted the cross-appellees, and arranged a meeting at the appellant's factory (Tr. 219, 910). Mr. Wilson thought all three of these established firms were good prospects for distribution of the appellant's water heaters in the thickly populated Puget Sound area (Tr. 219). The prospects met Fred Fowler, the President, at appellant's plant in Portland, and were shown through the factory (Tr. 910, 911). None of them committed themselves, nor did the appellant at that time (Tr. 911). Subsequently, each did separately make an initial purchase and continued to make additional purchases during the period involved (Tr. 914, Ex. A-42A-X). The appellees and the cross-appellees, during said period, purchased water heaters from others, as well as the appellant (Tr. 707, 713, Ex. A-4). The evidence established that appellees purchased at times from other manufacturers at prices cheaper than offered by appellant (Tr. 707, 712, 713).

The appellees, feeling themselves aggrieved for breach of the exclusive, sought redress from the Fowler Manufacturing Company, and pursuant thereto two documents were executed, dated September 9, 1960 (Ex. 1; A-32).

One granted to appellees the co-exclusive use with Schwabacher Hardware Company of the Fowler label, provided appellees purchased 10,000 electric water heaters (Ex. A-32). The other document is set forth verbatim in footnote 1 (Ex. 1).[1] Fowler Manufacturing Company was the main source of supply for appellees until August 21, 1962, when exhibit 1, by its terms, expired (R. 345; Finding XIII). Appellees, through counsel, admitted in open Court there was no alleged discrimination after August 21, 1962, and the Court found such to be the fact (R. 347, 348; Findings XVI, XVII).

The Fowler Manufacturing Company, from time to time, issued price lists (R. 344; Finding XII). The appellees, as well as the cross-appellees, frequently requested Fowler Manufacturing Company to deviate from the published price lists, allegedly to meet competition, and these requests were often granted (R. 344; Finding XII). There were various forms of deviations. Inventory clearances (R. 344), promotional allowances (R. 344), advertising allow-

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1. "September 9, 1960

Thrifty Supply Company
1 West Lander Street
Seattle, Washington
Attention—*Mr. Harold Gorlick*
Dear Mr. Gorlick:

We agree that Thrifty Supply Company of Seattle, Washington, has been damaged by a breach and cancellation of a distributorship contract on the part of Fowler Manufacturing Company and the Republic Appliance Division of Republic Transcon Industries, Inc.

We agree that the damages to which you are entitled total $37,500.00 which sum will be paid as follows:

We shall pay to you a sum equal to seven and one-half per cent (7½%) of the purchase price paid by you for electric water heaters purchased from Fowler Manufacturing Company or Republic Appliance Division during each month until the sum paid by us shall total $37,500.00. Said payments shall be made to you on or before the 15th day of each month and shall cover all purchases during the preceding month. We shall have no obligation whatsoever to pay said damages in any other manner or form and should you discontinue the purchase of electric water heat-

ances (R. 344), freight allowances (R. 344), and allowances to meet free delivery by competitors (Tr. 929, 930). On occasions, Fowler Manufacturing Company accepted back orders and protective orders to protect the customer against future change in published price list (R. 344). The Fowler Manufacturing Company thus endeavored to meet competition to hold onto its share of the wholesale market (R. 344). Appellees often complained about distributors of water heaters manufactured by competitors of the Fowler Manufacturing Company (Tr. 1045; Exs. A-3, A-4, A-5, A-6).

Invoice payment to the Fowler Manufacturing Company was due on the tenth of the following month when, prior to December, 1960 a two percent cash discount was allowed (Tr. 235). In December, 1960 the cash discount was changed to one percent (Ex. 16). The appellees and the cross-appellees, nevertheless, continued to take two percent cash discount, and the Fowler Manufacturing

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ers from the above named sources prior to payment in full of said sum of $37,500.00, we shall be relieved of any further obligation or liability to pay the balance of said damages.

It is understood and agreed that no deductions shall be made from invoices by you and that the full amount of said invoices will be paid by you when due. The 7½% hereinabove referred to shall be based upon the prices of heaters in effect at the time of each purchase by you, as set forth in our established price lists.

We reserve the right to change our established price lists at any time we see fit and the sum due to you by the terms of this agreement shall be based on the price lists in effect at the time of each purchase.

You will pay to Fowler Manufacturing Company all monies due to it at this date at once and will hereafter pay all accounts in full when due. You shall have no right of off-set as to the monies which we have agreed to pay you by the terms of this agreement.

Very truly yours,
FOWLER MANUFACTURING COMPANY
By Fred A. Fowler, President

Agreed to and accepted:
Thrifty Supply Company
By (Sgd.) Harold Gorlick"

Company accepted the same, until May 19, 1961 (R. 345; Finding XIII).

The March, 1961 payment due from the appellees was not paid (Tr. 1377-1381). The appellees were delinquent in the sum of approximately $35,000 (Tr. 1377-1381; R. 346; Finding XV). Gordon Copeland, an executive of the Fowler Manufacturing Company, called upon H. H. Gorlick on May 8, 1961 and obtained the payment for all of March and April invoices (Tr. 944, 945). H. H. Gorlick drew up a debit memo (Ex. 39), which was signed by Mr. Copeland. The next day, May 9, 1961, the Fowler Manufacturing Company issued its credit memo 321 (Ex. A-1), which is as follows:

> "Credit memo to clear up all credits owed to Thrifty Supply Company, for defective merchandise, pricing errors, and any and all other claims.
>
> "The acceptance of this credit memo by Harold Gorlick on behalf of Thrifty Supply Company is in full and complete settlement of all claims. $4,639.68"

There is no itemization in the credit memo.

There is considerable evidence in the case which establishes rather conclusively there could not be much of this sum attributable to defective merchandise, or mathematical errors (Tr. 945, 946, 1327-1329).

Shortly after the issuance of said credit memo 321, H. H. Gorlick met with Milton Stevens, Mr. Copeland's superior (Tr. 576), and pursuant thereto wrote a letter to Fowler Manufacturing Company, dated May 19, 1961, in which he agreed he would pay on time and that he would only take one percent discount, instead of two percent (Ex. A-24). The appellees then only deducted one percent for cash from their invoices, until the credits under

the agreement of September 9, 1960 were fulfilled, on or about August 21, 1962, when the appellees were again allowed two percent discount for prompt payment (R. 347, 348, Finding XVII).

The Fowler Manufacturing Company gave to Keller Supply Company a two percent discount, other than discount for prompt payment, on all merchandise purchased from it from on or about December 1961 excepting "Zenith" private label heaters (R. 347; Finding XVII). The total amount of purchases made by appellees, from on or about December 1961 to August 21, 1962 was the sum of $251,307.83. This discount was first granted in June, 1962, retroactive to December 25, 1961 (Ex. A-42-A-X; Credit Memos 656, 721). The Court, in awarding damages on this item, allowed $5,026.16 (R. 348; Finding XVII).

The Fowler Manufacturing Company, on or about February 27, 1962, gave to the appellees a private label, called "Chevron" (Ex. A-45; R. 340; Finding VII). Chevrons were identical with the other heaters manufactured by the Fowler Manufacturing Company, excepting for color of trim and data plate (R. 340, Finding VII). The appellees were allowed a five percent discount on all purchases of Chevrons (Ex. A-20, A-45). The total of sales of Chevrons from on or about February 27, 1962 to August 21, 1962 was $60,576.67 (Ex. A-20, A-45).

As soon as the agreement of September 9, 1960 expired on August 21, 1962, the appellees commenced to make substantial purchases of water heaters elsewhere (Tr. 705-707).

Appellees did not pay the August, 1962 invoices when due, and although the appellees made some additional

purchases from Fowler Manufacturing Company in September and October, 1962, they paid for none of the foregoing until appellees had judgment rendered against them (R. 263, 264).

On or about the latter part of November, 1962, Mr. Copeland met with H. H. Gorlick and settlement was made, resulting in issuance of checks for all the accounts, as follows (Ex. A-8, p. 4):

Thrifty Supply Company of Tacoma, Inc.	$ 7,597.63
Thrifty Supply Company of Yakima, Inc.	4,094.62
Thrifty Supply Company of Everett, Inc.	908.20
Thrifty Supply Company of Spokane, Inc.	4,235.81
Thrifty Supply Company of Seattle	19,092.62
Thrifty Supply Company of Seattle	9,800.00
	$45,800.88

The checks were dated December 4, 1962, and before they cleared the bank the appellees stopped payment on each of them (R. 263, 264; Ex. A-8, p. 4). Suit followed and the appellees cross-claimed, seeking relief under the State of Washington Unfair Practices Act, specifically R.C.W. 19.90.040[2] (Ex. A-8, p. 6), and Consumer Pro-

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2. "R.C.W. 19.90.040 *Price cutting practices forbidden—Generally.* It shall be unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, or to use any article or product as a 'loss leader', or in connection with any sale to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or otherwise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or to make or enter into any collateral contract or device of any nature, whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition."

tection Act, specifically R.C.W. 19.86.020,[3] 19.86.030,[4] 19.86.040[5] (Ex. A-8, p. 6). Judgment was entered on the Fowler Manufacturing Company claims and the Superior Court denied relief on the cross-claims of appellees (Ex. A-8, pp. 6, 7, 8; Ex. A-9, p. 3).

On October 28, 1964 appellees filed their cause of action in the District Court from which this appeal has been taken (R. 1). The District Court ruled all transactions occurring prior to October 28, 1960 were barred by virtue of the statute of limitations (R. 339, Finding IV).

At the time of trial, appellees introduced exhibit 13 (Tr. 285), which purported to analyze the discounts and allowances cross-appellees received from appellant, and which appellees asserted and claimed were not granted to them.

There was no attempt by appellees to introduce any evidence comparing price in terms of all discounts and allowances received by them, with all discounts and allowances received by cross-appellees, or any of them.

Appellant in this regard introduced into evidence exhibits A-13-A and A-13-B, A-53, A-55, A-66; the latter three of which were limited by the Court for impeachment purposes (R. 389), which compared the net prices paid by appellees with the net prices paid by cross-appellees (Tr. 1103, 1104, 1373, 1379, 1426).

3. "R.C.W. 19.86.020 *Unfair competition, practices declared unlawful.* Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

4. "R.C.W. 19.86.030 *Contracts, combinations, conspiracies in restraint of trade declared unlawful.* Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

5. "R.C.W. 19.86.040 *Monopolies and attempted monopolies declared unlawful.* It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce."

Appellees did not at any time bring in one of their own price lists, or record of re-sale price, nor did they call any of their salesmen, employees or customers to establish either a lowered price to meet the alleged discriminatory price difference, or loss of business proximately caused by the alleged price discrimination.

SPECIFICATION OF ERRORS

1. The Court erred in accepting the proffered concept of the respondent that the presentment of a difference in a function of price suffices to create a private litigant's claim of discrimination in price, under Section 2(a) of the Clayton act, as amended by the Robinson-Patman Act (Findings XVI, XVII; R. 347, 348.)

2. The Court erred in determining there was discrimination and erred to "assume" such discrimination did have the effect of substantially lessening or injuring competition among competitors of Fowler Manufacturing Company, as well as competition among appellees and cross-appellees and their competitors (Findings XVI, XVII, XVIII, XX; R. 347, 348, 349).

3. The Court erred in its failure to make findings relating the alleged discrimination to the evidence, showing the amount of business done by the appellees and cross-appellees with appellants during the two-year period involved, the number of heaters sold by the appellees before and after the alleged discrimination asserted by the appellees, nor any detailed analysis of "net price" differences in water heaters sold by appellants to appellees and cross-appellees (Conclusion of Law VI, R. 352).

4. The Court erred in failing to consider the effect of

"availability" of water heaters upon the alleged violation of Section 2(a) of the Clayton Act, as amended, under the evidence in this cause.

5. The Court erred, even utilizing exhibits A-53, A-55 and A-66 for impeachment purposes only, in determining there was significant price discrimination against appellees and in concluding appellant's principal defense was based on its interpretation of the September 9, 1960 agreement (Ex. 1). (Findings XVI, XVII, XVIII, XXIV; R. 347, 348, 350.)

6. The Court erred in not granting summary judgment on appellees' entire cause, rather than partial summary judgment (Finding XXI; R. 349).

7. The Court erred in determining the alleged price discrimination damaged the appellees to the extent of the price difference, without any evidence accepted by the Court establishing damage to appellees' business or property (Finding XVI, XVII; Conclusion of Law VII, VIII; R. 347, 348, 352).

8. The Court erred in entering judgment against the appellants, in favor of the appellees, in the sum of $34,-621.80, or any other sum (R. 362).

SUMMARY OF ARGUMENT

I.

The judicial definition of price, as used in the Clayton Act, as amended by the Robinson-Patman Act, is "net price." The plaintiff in such action has the affirmative burden to establish a difference in the "net price" at which the product is sold; and, the establishment of a difference in a function of price will not ordinarily be sufficient.

II.

The Court found electric water heaters distributed in the Puget Sound area at the time in question were simple in design, uniform in manufacture, and that there was little choice between the electric water heaters manufactured by the various companies distributing water heaters in the area served by appellees and cross-appellees (R. 340; Finding VII). The Court, in addition, found competition was keen. There were at least ten other manufacturers vying for the distributors' business in this territory (R. 340, 341; Finding VIII).

The Court found, too, there were at least eleven distributors other than those involved in this litigation, in the Puget Sound area, selling water heaters manufactured by others than the appellant (R. 341, Finding IX). Five of such distributors were known as the "Big Five" in the wholesale plumbing fixture business. All evidence in this cause as to prices of other manufacturers' water heaters indicated a price either as favorable or more favorable than appellant's prices. Such availability would appear on its face to dissipate any claim of damage because of alleged price difference.

III.

Exhibits A-13-A, A-13-B affirmatively established there was no discrimination of price, when utilized with the judicial concept of "net price." Exhibits A-53 and A-55, when used with the evidence explaining their limitations, created an effective impeachment of appellees' claim that appellant discriminated against appellees as to price.

IV.

Even assuming a price difference, there was no evidence

that the said price difference substantially lessened or tended to injure or destroy, or prevent competition between appellant and other manufacturers, or between the appellees and any customers of appellant.

V.

A price discrimination in a highly competitive product does not create a cause of action, without anything more, for treble damages under Section 2(a) of the Clayton Act, as amended.

VI.

The appellees, by interposing defenses predicated on R.C.W. 19.90.040, and R.C.W. 19.86.020, 19.86.030 and 19.86.040 in the State court action between these same parties, chose to split their cause of action. Having been denied relief on a substantial fragment of the alleged cause of action in the State forum, appellees should not be permitted to try again in the Federal Court—a practice, if tolerated, leading to interminable litigation.

ARGUMENT

I. The Word "Price" Means "Net Price" as Used in *Robinson-Patman*, 15 U.S.C.A. 13(a):

Section 2(a) of the Clayton Act, as amended, provides in part as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular posses-

> sion or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

The act does not define the word "price." The Courts and the text-writers have had occasion to define the word, as used in Robinson-Patman. In *Hoffman's Antitrust Law and Technique*, Vol. 2, at p. 415:

> "The word 'price' is not defined any place in the Clayton Act. In its ordinary meaning it signifies the net amount paid by the purchaser after deduction of discounts and allowances."

Rowe, in *Price Discrimination under the Robinson-Patman Act*, states at p. 87:

> ". . . Pertinent price for measure of statutory discrimination is actual invoice price quotation by sellers (1) inclusive of any elements of prepaid freight and (2) less any discounts or offsets against invoiced price."

In *Fruitvale Canning*, 52 F.T.C. 1504, 1520, the Commission, after stating it was concerned with the amount paid by the purchaser to the seller; and after taking into consideration all discounts, rebates and other allowances, said:

> "The fact that, in the fruit canning industry, price may mean gross price, is not controlling here, where for the purposes of inhibiting unlawful price discrimination, the principal factors are the 'net prices' and any differential that might exist as between purchasers from respondent of commodities of like grade and quality."

To isolate a segment of a price is meaningless under Section 2(a) of the Clayton Act, as amended. The net price determines whether one can compete successfully or whether the competitive process is affected.

II. Availability of a Similar Product Under the Same Terms and Conditions is a Defense to an Alleged Violation of Section 2(a) of the Clayton Act, as Amended.

Prior to (R. 273, and 275, pre-trial order, issue of fact 9 and issue of law 9) and throughout the trial of this cause, appellant urged the trial court that availability was a defense. The Court rejected appellant's position.

> "THE COURT: Is it conceded—it must be conceded, I assume, that there were water heaters available at these prices, such as is conceded with respect to General. I don't know that there is any issue on that, is there?
>
> "MR. BENSUSSEN: No issue. Wherever possible, where there was a better price available from another supplier, we bought. We stipulate to that.
>
> "MR. KOENIGSBERG: Oh, I will not stipulate to that.
>
> "THE COURT: Well, I will sustain the objection. I don't think that it is an issue in this case. I can go so far and that is about as far as I can go and, so, you can make your objection and I will sustain the objection and allow an exception." (Tr. 1032)

Availability is a defense to alleged violations to Section 2(a) of the Clayton Act, as amended.

Frederick Rowe, an eminent authority, stated in *Price Discrimination under the Robinson-Patman Act*, p. 186:

> "The lack of a causal nexus between the challenged price and asserted detriment to competition may exist by reference to (1) intervening economic factors influencing a buyer's resale activities; (2) added

> functions or offsetting costs by the low price buyer; (3) the competitive inertia of his rivals; (4) the availability of the goods at the lower price from another source."

In *Tri-Valley Packing Association v. F.T.C.*, 329 F.2d 694 (9th Cir., 1964), the defendant Tri-Valley sold and distributed canned fruits in the western part of the United States. Tri-Valley sold on the so-called "California Street Market" in San Francisco, at lower prices than to its customers who did not have a buying agency in San Francisco. Tri-Valley challenged a commission ruling unfavorable to it, on the grounds that its California price was available to all its buyers. The Court said:

> "To be more specific, if the lower price would have been available to the non-favored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the non-favored buyer paid more for the product is not the result of price discrimination but of the non-favored buyer's failure to take advantage of buying at the same low prices."

Also noted in this case is a quotation from the report of the *Attorney General's Committee to Study Anti-Trust Laws* (1955), at pages 164, 165:

> "Nor should a competitive price reduction be singled out as responsible for injury if alternative means of access to goods at the lower price are in any event available to the buyer."

This principle has also been recognized in cases involving alleged violations of the Sherman Act, 15 U.S.C.A. 1 and 2.

In *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir., 1955) Cert. denied, 350 U.S. 915 (1956) the plaintiff com-

plained of an inability to secure titanium pigment from the defendant. The Court held:

> ". . . It appears that other pigments could be and were, used as substitutes for titanium; and appellants admitted that they were able to get all of the ingredients to manufacture paint that they needed except titanium pigments. In fact, they purchased immense quantities of one of such substitutes, lithopone, in 1948, buying 403,050 pounds of it in that year. *They could not have been injured by their failure to secure all the titanium pigment they wanted, if they were able to obtain all they could use of a substitute in the form of lithopone.*" (Emphasis ours)

The United States Supreme Court in the recent case of *U.S. v. Arnold, Schwinn & Co.*, ... U.S. ....., 18 L.Ed. 1249, 87 S.Ct. 1856 (1967), a decision rendered subsequent to the trial of this cause, made a similar determination. In the cited case the Court was faced with the question of whether the unilateral adoption by a single manufacturer of an agency or consignment pattern for distribution could be justified under any circumstances by the presence of competition of mass merchandisers and the demonstrated need of a franchise system to meet that competition. The Court stated, page 1261:

> "But certainly in such circumstances, the vertically imposed distribution restraints — absent price fixing and in the presence of adequate sources of alternative products to meet the needs of the unfranchised—may not be held to be *per se* violations of the Sherman Act."

The Court then concluded that it was not convinced the defendant's actions constituted an "unreasonable" restraint of trade and stated:

> "Critical in this respect are the facts: (1) that other competitive bicycles are available to distribu-

> tors and retailers in the market place, and there is no showing that they are not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product; (2) that Schwinn distributors and retailers handle other brands of bicycles as well as Schwinn's; (3) in the present posture of the case we cannot rule that the vertical restraints are unreasonable because of their intermixture with price fixing; and (4) we cannot disagree with the findings of the trial court that competition made necessary the challenged program; that it was justified by, and went no further than required by, competitive pressures; and that its net effect is to preserve and not to damage competition in the bicycle market. Application of the rule of reason here cannot be confined to intrabrand competition. * * *"

Please compare sub-division (1) of the foregoing quotation with the first two sentences of the Court's Finding of Fact number VII (R. 340):

"VII

> "The electric water heater generally is simple in design, and quite uniform in manufacture. There was little choice between the electric water heaters manufactured by the various companies distributing in the territory served by the plaintiffs and by Keller Supply Company, Mesher Supply Company, and Rosen Supply Company. * * *"

Also, sub-division (2) of the quotation from the Supreme Court's opinion could apply with equal force to the case at bar as evidenced in the pre-trial order, admitted fact 36:

> "That at all times germane to plaintiff's pleadings until the issuance of checks upon which payment was stopped on or about November 28, 1962, the plaintiffs were purchasing water heaters from other manufacturers." (R. 265)

While the cases cited did not arise from alleged violations of Section 2(a) of the Clayton Act, as amended,

we see nothing in either court's decision that would limit the applicability of this rule solely to Sherman Act violations. The reasoning employed applies with equal force to Robinson-Patman wherein the plaintiff must prove damages to his business or property.

There was a substantial amount of evidence to the effect appellees had available to them reasonably interchangeable products at the same or lower prices than received by cross-appellees. Exhibit A-3 is a purchase order from H. H. Gorlick, dated August 14, 1962, quoting prices of three unnamed manufacturers and alleging they were lower than appellant's. Exhibit A-4 is a letter, dated April 9, 1962, from H. H. Gorlick, quoting General prices, as quoted by cross-appellees, and indicating they were substantially below appellant's. Exhibit A-6 is a purchase order from appellee, dated August 14, 1962, with the annotation that the prices quoted were of appellant's competition.

There is testimony that appellee constantly complained about competition from the distributors not handling Fowler's products (Tr. 951, 952, 1045). There is testimony that H. H. Gorlick informed appellant that at least six of appellant's competitors were selling at lower prices (Tr. 1041). The overwhelming conclusion to be reached is that appellees had wide freedom of choice of water heaters at equally favorable or more favorable prices than were offered or sold to cross-appellees by appellant.

III. Comparison of "Net Price" Extended to Appellees and Cross-Appellees Establish That None of Cross-Appellees Were Favored Over Appellees

The Court erred in entering Finding of Fact XVI:

"XVI

"As Finding XIII indicates, the defendant, Fowler Manufacturing Company, discriminated against plaintiffs with respect to the two percent cash discount subsequent to the accord and satisfaction of May 9, 1961. From about May 19, 1961 through August 21, 1962, plaintiffs only received a one percent cash discount while the actual cash discount in effect and received by other buyers of commodities of like kind and quality as those purchased by plaintiffs was two percent. As a result plaintiffs were damaged in the amount of the difference between the one percent and two percent cash discount for said period, that is, the sum of $3,514.44." (R. 347)

The Court erred in entering Finding of Fact XVII:

"XVII

"Commencing January, 1962 through August, 1962, co-defendant, Keller Supply Company, received a two percent price discount on all water heaters purchased from the Fowler Manufacturing Company except those water heaters labeled 'Zenith' water heaters (admitted fact No. 15, pretrial order). These discounts have been referred to as special credits and are variously designated as 'quantity discount,' 'advertising discount,' and 'Republic' discount (Items (O), (P), and (J) in Exhibit 13-a). No such discount was allowed plaintiffs on similar purchases until after damages payable under the September 9, 1960 agreement had been paid in full, that is, after August 21, 1962.

"As a result of the Fowler Manufacturing Company's discrimination in the allowance of said two percent price discount to Keller Supply Company, plaintiffs were damaged in the amount of $5,026.16, which sum equals two percent of the purchase price of water heaters of the same or similar type purchased by the plaintiffs from the Fowler Manufacturing Company commencing January, 1962 through August 1962, that is $251,307.83 (Transcript, p. 521, l. 9 through p. 522)." (R. 347, 348)

The Court erred in entering Conclusion of Law VI:

"VI

"The Fowler Manufacturing Company is in violation of 15 U.S.C. §13 in that it did discriminate in the sale in interstate commerce of products of a like kind and quality by selling said products at the same time to Keller Supply Company, Rosen, Mesher and to plaintiffs at differing prices without justification. The price discriminations found were such that the effect may have been to substantially lessen or injure competition among competitors of defendant, Fowler Manufacturing Company, as well as competition among plaintiffs and Fowler's co-defendants and their competitors."

The Court erred in entering Finding XXIV:

"XXIV

"Incorporated herein are any findings that may appear in any memorandum decision that may be filed herein in support or explanation of the findings of fact and conclusions of law herein contained."

1. ***Appellant did not incorporate into the Comparative Price Schedules prepared by it the 7½% received by the appellees through the Agreement of September 9, 1960.***

In all the "net price" comparisons set forth in schedules prepared by appellant, no consideration was given to the 7½% provided to appellees by the letter agreement of September 9, 1960 (Ex. 1). The schedules referred to above are comprised of exhibits A-13-A, A-13-B, A-53, A-55.

The District Court wrote a memorandum opinion, page 5 containing the following:

"The defendants' principal defense has been based on its interpretation of the September 9, 1960 agreement."

Appellant caused to be introduced into evidence Exhibit A-13-A showing all the discounts and allowances extended to appellees from October 28, 1960 to December 1, 1962 (Tr. 1165). At the bottom of the page, containing the recapitulation of all the discounts and allowances, is the following:

> "Note: Excluded from foregoing schedule is a 7½% special credit allowed plaintiffs by Fowler Manufacturing Co., on all electric heater purchases to a maximum credit of $37,500.00 by reason of September 9, 1960 Agreement."

Appellant urged throughout the proceedings that the average net prices extended to the appellees were as favorable, if not more so, than those granted to cross-appellees; that there was no impact on competition; that the appellees failed in showing any damage to their business; that availability in this highly competitive market of a standardized product was established beyond cavil, and finally that the Superior Court action was *res judicata,* as splitting a cause of action is not permitted.

Appellant urged, and continues respectfully to do so, that the September 9, 1960 agreement placed the appellees in a more favorable position in the market place and that the appellees and cross-appellees were not on an equal basis because of said agreement. However, appellant did not intend to convey the thought it was relying principally on the agreement of September 9, 1960.

2. *Exhibits establish no significant price discrimination.*

Appellees introduced in evidence as exhibits, 13-A, 13-B and 13-C, prepared by Robert Garthwaite, a Public Accountant, to indicate discounts, freight allowances and allowances extended by appellant to cross-appellees.

Exhibit 13-A indicates the discounts, allowances and freight allowances extended to Keller Supply Company from July 22, 1960 to March 31, 1963. Exhibit 13-B covered discounts, freight allowances and allowances extended to Rosen Supply Company, and Exhibit 13-C covered the same subject matter for Mesher Supply Company. Exhibits 13-B and 13-C covered the same period as Exhibit 13-A. The totals show the discounts and allowances given to Keller Supply Company, by virtue of much larger volume, were more than those granted to the other cross-appellees, and consequently the main thrust of appellees' contentions was directed to the Keller Supply Company. Keller Supply Company purchased almost as many water heaters as the appellees.

The reason appellees used the date commencing July 22, 1960 is that the Court did not finally rule as to the statute of limitations until after the evidence was all presented. The Court eventually held that any transaction prior to October 28, 1960 was barred by the statute of limitations (R. 339). The last purchase made by the appellees from the appellant was in October 1962 (Ex. A-53) so we cannot say why the appellee extended the period to March 31, 1963.

The first prerequisite of 2(a) of the Clayton Act, as amended, is comparisons. Appellees were content to furnish schedules as to discounts and allowances extended to the cross-appellees and point to certain of them and state they did not receive the same, and rest. The Court accepted this concept in part (R. 347, Findings number XVI and XVII), and rejected it in part (R. 348, Finding XVIII). The appellee's procedure ignored the "net price" theory.

Lofquist & Mulberg, Certified Public Accountants, prepared for the appellant a comparison study of the various credits received by the appellees, and the cross-appellees for the period from October 28, 1960 to December 1, 1962. This comparison study was introduced in evidence as Exhibits A-13-A and A-13-B. Exhibit A-13-A has a detailed analysis of the credits extended to the appellees for the said period; separating into categories and supplying the dates. Exhibit A-13-B covers the same subject matter for each of the cross-appellees.

Exhibit A-13B is keyed by letter to Exhibits 13-A, 13-B and 13-C, prepared by appellees' accountant.

The recapitulation of all the credits allowed to all four for the period October 28, 1960 to December 1, 1962, are as follows:

Thrifty Supply Companies	$30,930.95 (Ex. A-13-A)
Keller Supply Company	$26,817.74 (Ex. A-13-B, p. 5)
Rosen Supply Company	$ 7,595.87 (Ex. A-13-B, p. 5)
Mesher Supply Company	$ 5,340.12 (Ex. A-13-B, p. 5)

The amount of water heater business, in dollar volume, done by appellant with the appellees and the cross-appellees, for the period October 28, 1960 to November 1, 1962, is as follows:

Thrifty Supply Companies	$531,892.82 (Ex. A-52)
Keller Supply Company	$496,864.22 (Ex. A-52)
Rosen Supply Company	$140,112.82 (Ex. A-52)
Mesher Supply Company	$ 89,614.90 (Ex. A-52)

The foregoing dollar volume schedule does not take into account the 1% or 2% cash discounts for prompt payment, nor the following miscellaneous credits:

Thrifty Supply Companies	$ 5,258.16 (Ex. A-51)
Keller Supply Company	$ 455.60 (Ex. A-51)
Rosen Supply Company	$ 170.00 (Ex. A-51)
Mesher Supply Company	$ 291.28 (Ex. A-51)

The dollar volume figures when adjusted by the 1% and 2% discounts for prompt payment and the miscellaneous credits, are:

Thrifty Supply Companies	$519,616.41
Keller Supply Company	$486,926.94
Rosen Supply Company	$137,140.58
Mesher Supply Company	$ 87,531.34

The relative percentages of the foregoing credits to the total amount of purchases of water heaters from appellant is approximately:

Thrifty Supply Companies	5.95% of purchases
Keller Supply Company	5.51% of purchases
Rosen Supply Company	5.54% of purchases
Mesher Supply Company	6.10% of purchases

We set forth hereafter the recapitulation of Ex. A-13-A, which shows the credits allowed to Thrifty Supply Companies for the period October 28, 1960 to December 1, 1962, to demonstrate the many types of credits extended as a result of appellant endeavoring to meet the pressures exerted for price by appellees:

THRIFTY SUPPLY COMPANIES
CREDITS RECEIVED FROM
FOWLER MANUFACTURING CO. APPLICABLE TO THE PERIOD OCTOBER 28, 1960 TO DECEMBER 1, 1962

RECAPITULATION

(A)	*Freight Allowances*—November 1960 to June 1962 1.50 cwt on electric units; 0.66 cwt on gas; 1.00 cwt; 2.00 each; 0.36 cwt. Special allowances per Credit Memos		$10,603.04
(B)	*Cash Discounts* 2% (invoices marked 2%)	$ 377.04	
	2% (invoices marked 1%)	2,486.20	
	1% (invoices marked 1%)	4,408.53	
	2% (taken on checks not honored)	934.71	
	2% (taken on purchases not covered by checks)	19.22	8,225.70
(C)	*Product–Related Credits* January 20, 1961 to February 24, 1961 "Special Allowance inventory clearance" (A-15) 307 units of #52-109 @ $3.70 $1,135.90 60 units of #52-109 @ 4.42 265.20 133 units of #52-203 @ 3.70 492.10 36 units of #52-203 @ 4.42 159.12	$2,052.32	
	March 1962 to July 1962 "Price Adjustment per Agreement" "Chevron" units (A-20)	2,484.57	
	August 1962 to December 1962 "Price Adjustment per Agreement" "Chevron" units and Fowler units (A-21)	1,524.84	
	July 1962 to August 1962 Warehouse sales allowances 465 units, 52-gallon heaters @ 1.00 each; indicated on invoices	465.00	6,526.73
(D)	*Special Credit* April 26, 1961 "Promotional allowance—during 30-day promotional period" 84 heaters @ $3.70 each (A-17)		310.80
(E)	*Credit in Full and Complete Settlement of All Claims*—May 9, 1961 (A-1)		4,639.68
(F)	*Price Adjustment*—November 4, 1960 500 heaters @ $1.25 each (A-18)		625.00
	TOTAL ALL CREDITS		$30,930.95

Note: Excluded from foregoing schedule is a 7½% special credit allowed Plaintiffs by Fowler Manufacturing Co., on all electric heater purchases to a maximum credit of $37,500.00 by reason of September 9, 1960 Agreement.

Exhibit 13-A, prepared by Robert Garthwaite, showing the credits extended to Keller Supply Company in the sum of $38,161.58, whereas Exhibit A-13-B, prepared by Lofquist & Mulberg, shows credits extended to Keller Supply Company to be $26,817.74, does not mean there is a variance between the accountants, but rather that the period covered by Robert Garthwaite (Ex. 13-A) is from July 22, 1960 to March 31, 1963, whereas, the period covered by Lofquist & Mulberg is from October 28, 1960 to December 1, 1962 (Ex. A-13-B). The Court has cut off any claims arising prior to October 28, 1960. There were no purchases made by appellee after October, 1962. When we consider all the credits against all the purchases in the case as to the two large buyers, appellees and Keller Supply Company, we find there is a slight advantage in favor of the appellees, without in any manner considering the $37,500 the appellees received when they were given the benefit of the 7½% provided by Exhibit 1.

The appellant introduced in evidence Exhibits A-53, A-55 and A-66 (Tr. 1376, 1426). The Court limited their use for impeachment purposes (R. 389).

Ballentine's Law Dictionary, 2d Ed., p. 610, defines "impeach" as follows:

> "Impeach—To impeach is defined by Webster's New International Dictionary as to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to."

The purpose of Exhibits A-53, A-55 and A-66 was to call in question, challenge, as well as impute fault and defect to the procedure utilized by appellees to establish a difference in price, and in effect discredit the alleged price difference.

In Exhibits A-53, A-55 and A-66 only sales made in the same month were compared. For example, if the same model was purchased during the same month by appellees, and any one of the cross-appellees, it was compared. However, a purchase made in one month by appellees was not compared with a purchase made by a cross-appellee in preceding or subsequent months (Tr. 1378, 1379). Again, as in the comparison made by Lofquist & Mulberg on Exhibits A-13-A, A-13-B, the 7½% provided by Exhibit 1 was not considered.

In order to have a fairly accurate comparison, using Exhibits A-53 and A-55, the latter of which is a recapitulation of Exhibit A-53, it is necessary to make certain adjustments. As the main thrust of appellees is aimed at the other large buyer, we shall confine the present study of Exhibits A-53 and A-55 to appellees and cross-appellee Keller Supply Company. The following are adjustments which will give, in our opinion, an approximately true picture of the comparative net prices over the two-year period:

(1) Total amount in price differential on comparative sales in favor of Thrifty Supply Companies is $1681.13 (Ex. A-53, A-55).

(2) Cash discount differential for prompt payment from May, 1961 to August 21, 1962, is $3514.44 (Ex. A-56).

(3) On cross-examination appellees disclosed errors made in computation by appellant in favor of Keller Supply Company, amounting to $1247.10 (Tr. 1460, ll. 8-22; 1538, ll. 2-19; 1539, ll. 7-13; 1595, ll. 15-24; 1600, l. 23 to 1601, l. 3).

(4) Miscellaneous Credits:

Keller Supply Company	$ 455.60 (Ex. A-51)
Thrifty Supply Companies	$5,258.16 (Ex. A-51)

As the appellees' miscellaneous credit is comprised primarily of credit memo 321 (Ex. A-1), for $4,639.68, we should point out that this credit memo was to adjust what the appellees were claiming cross-appellees received by way of discounts.

The Court entered Findings of Fact XV, part of which is as follows:

"XV

"On or about May 1, 1961, after learning of the various allowances granted Keller, Rosen and Mesher, the plaintiffs became delinquent in the payment of their account. The March and April accounts were in excess of $40,000.00, of which approximately $35,000 was for delinquent invoices for March. Gordon Copeland, a Fowler Manufacturing Company executive at said time, sought payment from Harold Gorlick. On May 8, 1961 payment was obtained, and simultaneously a debit memo (Exhibit 39) was issued. On the following day the Fowler Manufacturing Company issued its credit memo 321 for $4,639.68 (Ex. A-1). Said credit memo was received by the plaintiffs and no objection or exception was to the terms set forth in credit memo 321.

"The credit memo does not detail the items for which the allowances were made. The credit memo was for a substantial amount and contains the following language:

" 'Credit memo to clear up all credits owed to Thrifty Supply Company, for defective merchandise, pricing errors, and any and all other claims.

" 'The acceptance of this credit memo by Harold Gorlick on behalf of Thrifty Supply Company is in full and complete settlement of all claims.

" '$4,639.68' " (R. 346)

The Court concluded credit memo 321 constituted an

accord and satisfaction of appellees claims to May 9, 1961.

It is obvious from the Court's finding, as a basis for the issuance of the large credit of $4,639.68, H. H. Gorlick was making claims to Gordon Copeland about the cross-appellees receiving discounts and allowances. The result was that Gordon Copeland agreed to issue a credit memo for $4639.68, and appellees issued a check paying its accounts and making them current.

H. H. Gorlick's own testimony indicates the nature of the transaction. In cross-examination counsel had occasion to ask if the witness had answered a specified question in his deposition of September 26, 1966:

"Q. Did you answer as follows:

> 'A. Well, I just answered that, after that disagreement was cleared up, I did, because it has been necessary in doing business with the Fowler Manufacturing Company to hold money to get a settlement of things that were in disagreement. That is our history of having done business with that company from the midpoint of 1960 on through 1962.'

"Q. Did you answer it that way?

"A. Yes." (Tr. 585, l. 18 to 586, l. 4.)

Carl Strutz, employed by appellant for 21 years at the time he testified (Tr. 1303) and then Vice-President and General Manager of the Company (Tr. 1303) stated that defective merchandise was adjusted promptly (Tr. 1327) and that in any event defective merchandise did not average over two-thirds of one percent (Tr. 1321) and also stated mathematical errors would be taken care of promptly (Tr. 1326).

Before demonstrating the over-all figures for the two-year period favored Thrifty Supply Companies over Keller Supply Company, without considering the agreement of

September 9, 1960, we call attention to two credit memos which in and of themselves are almost large enough to balance out the two percent trade discount referred to in the Court's Finding XVII (R. 347, 348).

Carl Strutz testified that Fowler, Chevron, Viking, Zenith and Republic water heaters were all manufactured at the Fowler Manufacturing Company plant, and they were all the same except for color of paint and data plate (Tr. 1312).

In *Borden v. F.T.C.*, 339 F.2d 133, 135 (5th Cir., 1964), the Court stated:

> "The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show the milk was packed or in any manner handled by Borden."

The case was appealed to the Supreme Court, *F.T.C. v. Borden*, 383 U.S. 637, 86 S.Ct. 1092, 16 L.Ed.2d 153 (1966), wherein it was held:

> "Labels do not differentiate products for the purpose of determining grade or quality, even though one label may have more customer appeal and command a higher price in the market place from a substantial segment of the public."

It is clear, we submit, in determining "net price", in view of the foregoing, in the instant case no attention need be paid to labels.

The difference in the cash discount referred to in Finding XVI occurred from May, 1961 to August 21, 1962, and the two percent trade discount extended to Keller Supply Company referred to in Finding XVII commenced in December, 1961. The total of these discounts, if applied to the water heater purchases of the appellees,

amounts to the sum of $8,540.60 (Conclusion VII, R. 352).

From March, 1962 to July, 1962 appellees were receiving credits of five percent on Chevron, amounting to $2,484.32 (Ex. A-13-A, A-20) and from August, 1962 to December, 1962 one, two, three and five percent credits on Fowlers and Chevrons, amounting to $1524.84 (Ex. A-13-A, A-21). These alone amount to $4009.16. The foregoing credits are shown under letter "C" of Exhibit A-13-A.

Taking into account all adjustments, Exhibits A-53 and A-55 establish the difference in "net price" paid by Keller Supply Company and appellees for the pertinent two-year period, to be as follows:

(1) Difference in prices are in favor of Thrifty Supply Companies when compared with Keller Supply Company (Ex. A-53, A-55)		$1681.13
(2) Cash discount difference of 1% favoring Keller Supply Company, for the period of May, 1961 to August 21, 1962 (Ex. A-56)	$3514.44	
(3) Mathematical errors in Exhibits A-53, A-55, favoring Keller Supply Company (Ex. A-51)	1247.10	
(4) Miscellaneous credits, Keller Supply Company	455.60	
Miscellaneous credits, Thrifty Supply Companies		5258.16
	$5217.14	$6939.29
		–5217.14
Net price difference, showing the amount of additional money Thrifty Supply Companies would have paid over the two-year period, if charged the same prices as Keller Supply Company		$1722.15

Appellees may assert that Exhibits A-53 and A-55, while setting forth all the sales made by appellant to appellees and cross-appellees, do not compare them all. This is true, as sales were only compared if made within the same month. However, the comparisons contain the large bulk of the sales, and it is only fair to assume any more detailed analysis would expand the difference already shown in favor of the appellees.

IV. Price Discrimination Alone in a Highly Competitive Market, Does Not Satisfy the Requirement of Robinson-Patman to Establish Effect of Substantially Lessening or Injuring Competition.

The Court erred in permitting an assumption to fulfill the requirement of evidence as to substantial lessening or injuring competition. The Court made the following Finding of Fact:

"XX

> "The precise effects of the price discriminations found to exist upon competition in the manufacture and sale of electric hot water heaters are difficult to ascertain. However, it is reasonable to assume in the highly competitive market involved that such discrimination did have the effect of substantially lessening or injuring competition among competitors of Fowler Manufacturing Company as well as competition among plaintiffs and Fowler's co-defendants and their competitors."

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was aimed at protecting the small buyer from the competitive power of the large buyers. Chain-store buyers, with their ability to distribute large quantities of any marketable product, were the primary targets of Robinson-Patman.

Thus, Phillip Elman, a Federal Trade Commissioner, in an article recently appearing in 42 Washington Law Review 1 (October, 1966) entitled *"The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal,"* states at page 5:

> "As the Supreme Court stated in the *Sun Oil* case, 'Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.'
>
> "Given an imperfect world, such a design involves no necessary inconsistency with basic antitrust policy, since the 'competition' sought to be limited is unfair rivalry among unequals, a type of conduct that may lead to monopoly. Thus, the policy of the Robinson-Patman Act is rooted in a justifiable ethic: that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller and weaker rivals."

The situation is reversed in the case at bar. The appellees are the largest buyer from the appellant in the State of Washington, and the largest buyer of the four involved in this litigation (Tr. 1018).

The District Court characterized the appellant's actions in the hot water heater market in Finding number XII (R. 344):

> "XII
>
> "While the Fowler Manufacturing Company issued price lists from time to time, established prices frequently varied from the published prices. Moreover, the plaintiffs and Fowler Manufacturing Company's co-defendants often requested the Fowler Manufacturing Company to deviate from the published price list allegedly to meet competition, and these requests were frequently granted. Often these deviations took

the form of special quotes; at other times freight allowances were granted; and on other occasions special allowances in lieu of cost of delivery were made. At times the Fowler Manufacturing Company accepted protective orders and back orders—to protect the purchaser against a change in the published price list. At times Fowler would reduce prices for inventory clearances, or allow a discount for promotion of a label. The Fowler Manufacturing Company thus endeavored to meet competition to hold onto its share of the wholesale market."

Commissioner Elman, in 42 Washington Law Review, *supra,* states at page 11:

". . . A difference in price might confer some transient advantage upon a favored buyer and yet at the same time reflect healthy and vigorous competition at the seller level—the so-called primary line—or the initiation of a much needed price break at the seller level. Moreover, temporary and shifting price discriminations, even of a substantial nature, are not necessarily injurious to competition but may reflect instead the kind of bargaining and haggling which is an essential part of the competitive process. In competitive markets some buyers may obtain a price advantage on one item while others obtain a counterbalancing advantage on another. Where there is no central pattern in these discriminations, where they are temporary or sporadic, or where they tend to cancel each other out, they are not likely to produce any harmful effect upon the competitive process. To the contrary, they merely reflect varying pressures within a vigorous and healthy competitive market. * * *"

In *Crest Auto Supplies, Inc. v. Ero Mfg. Co.,* 360 F.2d 896, 901 (7th Cir., 1966) the Court stated:

"It is clear that one of the elements of a violation of 2(a), as amended, by the Robinson-Patman Act, *is the requisite competitive effect* and that price differentials alone are not enough."

The Court admitted in the instant case that it was difficult to ascertain the exact competitive injury but assumed because competition was aggressive that this injury existed.

The Court was not in position to evaluate the competitive effect as appellees did not offer any acceptable evidence that the alleged discrimination had any effect upon competition. We urge, the reason for this void is there was no effect.

To accept the Court's assumption, based on the mere fact of "highly competitive market," is to read the requirement of substantial lessening or injuring competition out of the Robinson-Patman Act.

It should also be stated that the District Court, in finding there was injury to competition between appellant and its competitors, decided a question never in issue. An examination of appellees' complaint and the pre-trial order indicated that appellees never urged that competition at the manufacturer's level suffered an injury. The only evidence on Fowler's competitors is that they existed, that they sold the same product at the same or lower prices, and that they were aggressively competing for the same business. There was not any evidence concerning appellant's competitors' sales volume, or their competitors' inability to sell to appellees or cross-appellees, injury to their business, or any of the other factors relevant to the concept of injury to competition.

The first indication any of the litigants had that the Court was considering injury to competitors of the appellant was when the Court handed down its Findings of Fact and Conclusions of Law.

V. Appellees Never Demonstrated Any Actual Damages to Their Business or Property Resulting From the Alleged Price Discrimination

The appellant has previously set out Findings of Fact XVI and XVII in connection with Section III of the appellant's argument. The pertinent portions of the two findings to be considered in the instant argument and upon which appellant predicates error, are:

"XVI.

". . . As a result plaintiffs were damaged in the amount of the difference between the one percent and two percent cash discount for said period, that is, the sum of $3,514.44."

"XVII.

"* * *

"As a result of the Fowler Manufacturing Company's discrimination in the allowance of said two percent price discount to Keller Supply Company, plaintiffs were damaged in the amount of $5,026.16, which sum equals two percent of the purchase price of water heaters of the same or similar type purchased by the plaintiffs from the Fowler Manufacturing Company commencing January, 1962 through August, 1962, that is $251,307.83 (Transcript, p. 521, l. 9 through p. 522)."

The Court erred in making its Conclusions of Law VII and VIII:

"VII.

"As a result of said violation, plaintiffs have been damaged in the amount of $8,540.60. This amount will be trebled pursuant to 15 U.S.C. §15 and plaintiffs shall have judgment against the defendant, Fowler Manufacturing Company, in the amount of $25,621.80."

"VIII.

"Pursuant to 15 U.S.C. §15 plaintiffs shall also

> have judgment against the defendant, Fowler Manufacturing Company, for costs, including reasonable attorney's fees, the amount of which shall be determined after a hearing."

The text of 15 U.S.C.A., § 15, is as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The burden placed upon a litigant in a private treble-damage action under Section 2(a) of the Clayton Act, as amended by Robinson-Patman, is characterized in 2 Hoffman, *Anti-trust Law and Practice*, at p. 452:

> "In a private action for injunction or recovery of damages, the plaintiff cannot rely on the inference of reasonable possibility or even a probability of injury. He must allege and prove that the wrong violating the act was the proximate cause of ascertainable damage to business and property."

Flintkote Company v. Lysfjord, 246 F.2d 368, 392 (9th Cir., 1957) Cert. den. 355 U.S. 835 (1958), stated it in the following manner:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue."

This rule has also been upheld in *Momand v. Universal Film Exchange*, 172 F.2d 37 (1st Cir., 1948); *E. V. Pren-*

tice Mach. Co. v. Associated Plywood Mills, 252 F.2d 473 (9th Cir., 1958) Cert. denied, 356 U.S. 951 (1958); *Talon, Inc. v. Union Slide Fasteners, Inc.*, 266 F.2d 731 (9th Cir., 1959); *Story Parchment Co. v. Patterson Paper Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946).

Appellees' theory was that they were injured at least in the amount of the alleged price difference, nothing else appearing. They also claimed damages in the form of lost profits and business, but the evidence produced on the latter was not acceptable to the Court (Finding XIX, R. 347, 348).

Appellees' theory of damages admittedly found some acceptance in the early decisions under Section 2(a) of the Clayton Act, as amended. However, a forceful opinion by Judge Learned Hand, in *Enterprise Industries v. Texas Co.*, 240 F.2d 457 (2d Cir., 1957) Cert. denied 353 U.S. 965 (1957), states the better and more widely accepted rule of law. The trial court, in *Enterprise Industries*, had assessed damages by accepting as a measure of plaintiff's loss the difference in price. Judge Hand considered the trial Court's ruling in light of Congressional intent:

> "At all events the statute should not be read as creating any presumption that 'where the fact of damage is shown . . . the pecuniary amount or equivalent of the prohibited discrimination' is the proper 'measure of damages'. Exactly that was a provision in the bill, when it came from the Senate to the House (S. 3154, 74th Congr., 2nd Sess.), and it was eliminated in conference. This action becomes particularly persuasive in contrast with the retention

> of that part of §13(b) that imposes a burden of proof on the seller as to the effect of a 'discrimination'. Congress obviously did not wish the seller to be under a double burden, as soon as the buyer proved that he had been charged a higher price than any of his competitors; especially the burden of proving the negative upon an issue as to which the seller could know nothing and the buyer everything. Indeed, that was a burden that Congress might well hesitate to impose in an action in which the seller must not only make good the buyer's loss, but also must pay him a fine in double the amount of the loss. It is fair to suppose that, if Congress had thought the evil of price discrimination so great as to require so drastic a procedural support, it would have made its purpose more clear."

As to the question of how damages should be measured, the Court's opinion quoted Justice Cardozo in *I.C.C. v. U.S.*, 289 U.S. 385, 77 L.Ed. 1273 (1933):

> " 'If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered * * * price * * * damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more.' 289 U.S. at pages 390, 391, 53 S.Ct. at page 610. 'Overcharge and discrimination have very different consequences, and must be kept distinct in thought.' 289 U.S. at page 390, 53 S.Ct. at page 609."

The Court then decided the plaintiff produced no evidence that demonstrated his injury. This concept has been widely accepted in the cases which succeeded *Enterprise Industries v. Texas Co., supra,* involving Robinson-Patman.

In *Alexander v. Texas Co.*, 165 F. Supp. 53 (W.D. La., 1958), the Court held that the complaining service sta-

tion operator must support alleged lost business to a favored dealer with reliable figures. The Court also mentioned the plaintiff made no attempt by reliable figures or otherwise to deduct from "gross loss" any added profit he may have made by passing the prise rise to customers. The appellees in the case at bar did not produce in evidence accepted by the District Court, one figure, or any exhibit such as their own price lists, or one witness as to damage to their business or property, other than the alleged price difference.

In *Kedd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir., 1961), it was established that a filling station operator paid more for his gasoline than his competitors. There was no showing however that his competitors, who sold in a nearby area, lowered prices, or that the operator lost any customers. The Court denied him damages of a price differential. Most assuredly, there was not in the case at bar any attempt made by appellees to show that competitors lowered prices, nor was any evidence produced at trial that appellees lost a single customer on account of the alleged discrimination in price.

In *Youngson v. Tidewater Oil Co.*, 166 F. Supp. 146, (D.C., Ore., 1958) the Court was faced with the same problem. Using the *Enterprise Industries v. Texas Co.* case, 240 F.2d 457, (2d Cir., 1957) as precedent, the Court held:

> "In the Enterprise case, Judge Learned Hand held that plaintiff must show that the price discrimination actually diverted customers to the favored dealers, or forced plaintiff to lower his retail price in order to compete. He pointed out that the question is not how much better off plaintiff would be if he had paid a

lower price, but how much worse off he is because others have paid less."

In *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir., 1955), a case pre-dating *Enterprise v. Texas Co.*, 240 F.2d 427 (2d Cir., 1957), the Court was faced with an alleged price-fixing conspiracy. The Court held:

> "As to the claimed price fixing conspiracy, there is no proof that appellants sustained any injury as a result of appellees' conduct or alleged conduct. Even assuming that appellees were engaged in such a conspiracy, there is no evidence that prices were fixed at a higher level than would have been the competitive price, in the absence of price fixing, and that they were damaged by paying the higher prices, and lacking such evidence, there would be no proof of injury. * * *"

In *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 734 (9th Cir., 1959) the Court stated:

> "Implicit in the conclusion of the district court that Union failed to prove injury to its business or property is the finding by the trial court that Union had not sustained the burden of proof resting upon it to establish that Talon's unlawful acts were the proximate cause of Union's loss of profits. The only ruling of the district court occurring during the trial of which Union complains in its brief relates to the rejection of Union's offer of proof of loss of profits. No attempt or offer of Union was made to show that it sold less zipper machines or less zippers, or that it was forced to sell its machines or zippers at reduced prices, or that it was otherwise impaired or adversely affected in its business, because of the unlawful acts of Talon."

H. H. Gorlick, the primary complaining witness, did state that he always met competition. Significant in this connection he never did state he lowered his price, nor did he produce any price list showing that he did, nor did he

produce one invoice to indicate he lowered his price to meet the competition in any of appellant's products.

Appellees ran a profitable enterprise during the period of alleged discrimination (Ex. A-33; A-34). They competed successfully in the market place. They sold considerably more electric water heaters during the two-year period involved than in the preceding year or subsequent years (Tr. 1560):

1960	5,579 water heaters
1961	6,902 water heaters
1962	7,341 water heaters
1963	5,741 water heaters
1964	5,582 water heaters
1965	figures not available.

Success of this nature is hardly consonant with claims of injury.

The Court, on pages 6, 7 of the Memorandum Opinion, states:

> ". . . The evidence establishes without doubt, if not tacitly admitted by defendants, that Thrifty did meet competition of the co-defendants and lost profits by meeting such prices at least to the extent of the difference in cost of the water heaters sold by Thrifty, and cost of the water heaters sold by co-defendants."

Appellant contended throughout the trial and in a brief submitted thereafter (R. 318-321) that there was no showing by appellees that any injury had been sustained, utilizing much the same authorities as set forth herein. Fred Fowler, former President of appellant, testified that at a meeting in November of 1960 there were complaints from cross-appellees that appellant was underselling them (Tr. 939, 940). Exhibit A-59 demonstrated that appellees

were offering their customers six percent for cash. William Buterbaugh, an employee of appellees until January 1, 1961, testified until he left the employ of appellees he used exhibit A-59 as an inducement to make sales (Tr. 1410). There was no showing this practice was discontinued. There was no indication any of the cross-appellees made the kind of offer in exhibit A-59 to their customers.

Appellant contended, as the Court stated, that appellees met competition or undersold it. Injury to business or property, however, can only be sustained upon a showing of a lowered price to meet competition or a loss of business.

In connection with this, we suggest that the $37,500 received by appellant was a windfall. The Court's own findings indicate that the electric water heaters sold by the various manufacturers are essentially the same product, and that the market is aggressive. Thus the competition plaintiff received from cross-appellees would be just as vigorous no matter what brand they were selling. As an example, one of appellees' bitterest complaints, graphically illustrated by Exhibit A-4, dated April 9, 1962, was on the prices at which cross-appellees were selling General water heaters, and not water heaters manufactured by the appellant. Because of this product interchangeability, it is most doubtful that an exclusive on any one brand is worth very much. It was appellant's contention that appellees got equal or better treatment from appellant, notwithstanding the $37,500. With it, it is rather obvious they could undersell cross-appellees.

There being no acceptable evidence introduced by appellees on the question of damage to appellees' business or property, the case should have been dismissed for failure

to produce evidence which sustains a private treble-damage cause of action under the Clayton Act, as amended by the Robinson-Patman Act.

VI. Splitting a Cause of Action Constitutes a Bar.

The appellant, in the Superior Court of the State of Washington for King County did commence a cause of action, cause number 599283, entitled: Fowler Manufacturing Co., a corporation, vs. Harold Gorlick and Jane Doe Gorlick, his wife, and Morris Gorlick and Jane Doe Gorlick, his wife, d/b/a Thrifty Supply Company; and, Thrifty Supply Co. of Everett, Inc.; Thrifty Supply Co. of Spokane, Inc.; Thrifty Supply Co. of Tacoma, Inc.; Thrifty Supply Co. of Yakima, Inc. Appellant in said cause was seeking to recover on six checks upon which appellees stopped payment, dated December 4, 1962, totaling $45,-800.88 given in payment of water heaters sold to the appellees from on or about August, 1962 to the last of October, 1962 (Ex. A-8, p. 4).

Appellees herein caused to be joined in said action the cross-appellees as additional defendants, and did thereupon file their cross-claims seeking to recover on alleged violation of R.C.W. 19.90 entitled "Unfair Practices Act" the sum of $65,000 and attorney fees and costs, and on alleged violation of R.C.W. 19.86 $65,000 plus attorney fees and costs (Ex. A-7, p. 2, 3, 4, 5).

After trial, in which appellant was awarded judgment (Ex. A-9) against the appellees for the price of the water heaters covered by the said checks, payment of which was stopped, the Court entered Findings of Fact, Conclusions of Law and Judgment (Ex. A-8, A-9). The Superior Court

included in its Findings those numbered VIII,[6] IX,[7] X[8] and XI,[9] which embraced the statutes mentioned therein.

The Court entered judgment, embodying the following:

> "ORDERED, ADJUDGED AND DECREED that the cross-claims of the defendants be and they are hereby dismissed with prejudice" (Ex. A-9).

The District Court, upon appellant's motion for summary judgment (R. 74) did conclude, in view of R.C.W. 19.86.030 and R.C.W. 19.86.040 that the State Court judgment was res judicata because the foregoing cited State statutes were in essence the counter-part of Sections 1 and 2 of the Sherman Anti-trust Act, and granted summary judgment in part only, allowing the appellees to pursue their claim of violation of the Clayton Act, as amended by Robinson-Patman, U.S.C.A. 13 and 13(a)—in short, allowing the appellees to split their cause of action.

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6. "VIII
That in the cause of action herein for the recovery of money for goods sold and delivered, the said defendants did make Howard Keller, Keller Supply Company, Inc., Max Rosen and Norman (Nate) Mesher, additional defendants and did interpose cross-complaints against the plaintiff and said additional defendants, confining the same to R.C.W. 19.90.040, 19.86.020, 19.86.030, and 19.86.040."

7. "IX
The depositions of the principal defendants, their pleadings, their answers to interrogatories and all the statements made by counsel for the defendants, including an opening statement, did not produce any justiciable issue on the cross-claims predicated on R.C.W. 19.90.040."

8. "X
Considering the depositions, answers to interrogatories, pleadings, opening statement and other statements by defendants' counsel, it affirmatively appears there is no justiciable issue on any alleged violations of R.C.W. 19.86.030 and R.C.W. 19.86.040."

9. "XI
Considering the depositions, the answers to interrogatories, pleadings, opening statement and others by counsel for defendants, and accepting everything as true, there is no justiciable issue as to violation of R.C.W. 19.86.020 as no private action for any of the relief sought lies under said provision, as reflected by R.C.W. 19.86.090."

In *F. L. Mendez Co. v. General Motors Corporation,* 161 F.2d 695 (7th Cir., 1947), the Court stated:

> "He is not at liberty to split up his demand and prosecute it piecemeal, or present only a portion of the grounds and leave the rest to be presented in a second suit if the first suit fails; such practice would lead to endless litigation.

Another cogent case is *Williamson v. Columbia Casualty and Electric Corporation,* 186 F.2d 464 (3rd Cir., 1950). In this case the first complaint alleged Sherman Act violations; the second, Clayton Act violations. The only difference between the allegations made in the first and second suit was that the first included that of conspiracy. Once a determination was made unfavorable to the plaintiff on the basis of the Clayton Act, the Court held that his action on the Sherman Act was barred by reason of *res judicata.* The Court said that the fact different statutes are relied upon does not make the claims different. To the same effect is *Engelhard v. Bell and Howell,* 327 F.2d 30 (8th Cir., 1964).

There is one case, *Lyon v. Westinghouse Electric Corporation,* 222 F.2d 184 (2nd Cir., 1953) cert. denied, 345 U.S. 923 (1953), which is contra to appellant's contention on this point. There have been three Law Review articles which have questioned the validity of the case. In 69 Harvard Law Review, 573 (1956), it was stated that the *Lyon* opinion was inconsistent with the necessary implication of U. S. Supreme Court decisions in the patent field, especially *Becher v. Contoure Laboratories, Inc.,* 279 U.S. 388, 73 L.Ed. 752 (1929). This article also questioned the validity of the majority's conclusion that the uniform need for application of the anti-trust laws required a

finding that a state court's decision would not be *res judicata* to a Federal Court action under the Federal anti-trust laws.

In 31 N.Y. U. Law Review 955 (1956), it is stated that there is no clear majority holding in the *Lyon* case. The article also points out this case used questionable distinctions to avoid the *Becher v. Contoure Laboratories, Inc.* case, *supra.*

8 Stanford Law Review 439 (1956) is the most extensive comment on the case. Its conclusion is particularly cogent, page 451:

> "Exemption from the effect of state court anti-trust proceedings must ultimately be founded upon interpretation of the anti-trust acts. It is to be wondered, then, whether a legislative policy so tenuously inferred ought to override a policy so firmly established and long recognized by the courts—that of *res judicata*—without more explicit legislative provision."

The article also states the following as a worthy argument in favor of the estoppel rule:

> "The dilemma facing the state court defendant considering whether to embark his claim as a defense, is very much eased by the fact that he might recover as damages in a later anti-trust action thrice the amount he lost in the state court. Hence when the claimant has chosen to interpose the defense he should not be heard to complain that the Federal courts are no longer open to him." (p. 450).

In *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820 (9th Cir., 1963) the Court examined the *Lyon* case, noting there was a dissent, and neither accepted nor rejected the reasoning of the opinion. In footnote 17, page 832, it is stated:

> "In his opinion on petition for rehearing Judge Hand indicated that after studying Becher v. Contoure Lab-

oratories, 279 U.S. 388, 49 S.Ct. 356, 73 L.Ed. 752, he had concluded that it would be possible for findings of fact in the state court to operate as an estoppel in the action in the federal court and thus put an end to plaintiff's claim. He went on to conclude that the particular state court judgment there involved could have no such effect."

CONCLUSION

There was little choice in water heaters being offered by the various manufacturers distributing water heaters in the Puget Sound area. The prices quoted by them were at prices equal to or below those granted to the alleged favored buyers of Fowler Manufacturing Company. In a highly competitive market on such interchangeable item, availability would neutralize the impact of any price difference, such as asserted in the instant case, extended by one manufacturer to any of its customers. Especially is this true in the case of the appellees, who were at all times selling water heaters manufactured by others than appellant.

In any event, the evidence established over the two-year period involved that the "net price" slightly favored the appellees over their large buyer competitor, Keller Supply Company. This conclusion is reached without in any manner giving consideration to the agreement of September 9, 1960. The agreement in question placed the appellees in an advantageous market position.

The price differences established, at times favoring the appellees and at other times the cross-appellees, in the highly competitive market, were temporary, shifting and sporadic, a pattern which tends to cancel one price advan-

tage against the other, and contradict any contention as to lessening or injuring competition.

The appellees failed to sustain the burden of proving they at any time lowered their price to meet an alleged price discrimination, or that they lost any customers by the alleged price discrimination, and hence failed to establish damage to their business or property.

The appellees chose to interpose their anti-trust claims in the State Court case instituted by appellant. The anti-trust claims, predicated on alleged facts which are the same or similar to those advanced in the instant case, having been dismissed with prejudice, should be barred. To hold otherwise is to permit splitting a cause of action—a practice which leads to interminable litigation.

Respectfully submitted,

KOENIGSBERG, BROWN & SINSHEIMER
By L. M. KOENIGSBERG
Attorneys for Appellant and Cross-Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

L. M. KOENIGSBERG
Of Attorneys for Appellant and Cross-Appellees

APPENDIX

TABLE OF EXHIBITS

Plaintiffs:

Number	Marked:	Offered:	Admitted:	
1	R. 280	26	26	
2	R. 280	28	30	
3	R. 280	227	227	
4	R. 280	49	49	
5	R. 280	65		
10	R. 280	75	75	
11-A	1074	1074	1075	
12	R. 280	68	69	
13-A	304	327	328	
13-B	375	376	376	
13-C	377	378	381	
16	R. 280	64	64	
17	R. 280	35	35	
18	7	8	10	
19	R. 280	11	14	(rejected)
20	10	11	11	
21	10	11	11	
22	10	11	11	
23	10	11	11	
24	10	11	11	
25	10	11	11	
26	14	15	16	
27	14	16	17	
28	17	18	18	
29	18	19	19	
30	23	23	24	

TABLE OF EXHIBITS (Continued)

Plaintiffs':

Number	Marked:	Offered:	Admitted:
32	220	222	
33	724	724	725
33-A	1110	1110	1110
34	46	48	48
35	429	430	430
36	429	463	463
37	473	724	725
38	476	476	476
39	716	717	717
40	737	775	775
41-AB	740	775	775
41-C	767	768	768
41-D	817	817	818
42	772	774	774
43	808	808	808
44	845	845	846
45-A	849	856	856
46	872	872	872
47	987	987	987
48	993	996	998 (rejected)
49	1264	1264	1264
50	1469	1470	1471
51	1470	1472	1473
51-A	1476	1476	1476

TABLE OF EXHIBITS (Continued)

Defendants':

Number	Marked:	Offered:	Admitted:
A-1	R. 280	564	564
A-1-A	1138	1138	1140
A-2	R. 280	581	582
A-3	R. 281	616	619
A-4	R. 281	625	626
A-5	R. 281	620	621
A-6	R. 281	623	624
A-7	R. 281	1421	1421
A-8	R. 281	1421	1421
A-9	R. 281	1421	1421
A-13-A	1143	1165	1166
A-13-B	1168	1168	1186
A-14	R. 281	594	595
A-15	R. 281	611	614
A-17	R. 282	1136	1137
A-18	R. 282	642	643
A-18-1	644	645	645
A-20	R. 282	1130	1130
A-20-A	1112	1113	1113
A-21	R. 282	1112	1113
A-24	R. 282	572	572
A-28	R. 283	1031	1032 (rejected)
A-29	R. 283	1544	1544
A-30	R. 283	1544	1544
A-31	R. 283	1544	1544
A-32	564	564	565
A-33	1222	1222	1222
A-34	1222	1222	1222
A-35	382	383	384
A-36	456	456	460

TABLE OF EXHIBITS (Continued)

Defendants':

Number	Marked:	Offered:	Admitted:
A-36-A	457	460	460
A-37	630	634	634
A-38	692	694	694
A-39	694	695	696
A-40	696	696	696
A-41	1302	1302	1302
A-42-A-1	1021	1158	1159
A-42-A-3	1274	1274	1274
A-42-C-1	1589	1589	1589
A-43	1021	1211	1212
A-43-A	1210	1211	1211
A-45	1078	1079	1079
A-48	1308	1311	1312 (rejected)
A-50	1352	1352	1352
A-51	1367	1364	1376
A-52	1370	1370	1376
A-53	1373	1370	1376
A-54	1374	1376	1377
A-55	1379	1370	1376
A-56	1371	1372	1376
A-59	1397	1397	1411
A-60	1399	1400	1401 (rejected)
A-61	1401	1406	1406 (rejected)
A-66	1426	1426	1426
A-67	1609	1609	1610
A-68	1609	1609	1610

Note: "R" refers to exhibits marked in the pre-trial order; All other references are to pages in the transcript.

Note: Court reporter duplicated numbering of pages 1371 to 1379 in the transcript.